Filed 1/28/13 In re Daniel S. CA3
Appendix attached

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Trinity)

In re DANIEL S. et al., Persons Coming Under the Juvenile Court Law.	
TRINITY COUNTY HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. CHRISTOPHER S., Defendant and Appellant.	C071452 (Super. Ct. Nos. 11JU059A, 11JU059B, 11JU059C)

Christopher S., father of the minors, appeals from the juvenile court's orders terminating his parental rights as to Catherine and Q. and implementing a plan of long-term foster care as to Daniel. (Welf. & Inst. Code,[1] §§ 366.26, 395.) He challenges a jurisdictional finding that provided the basis for the denial of reunification services and thus the basis for the juvenile court's subsequent section 366.26 orders terminating parental rights and implementing long-term foster care. We shall reverse the section

[1] Further undesignated statutory references are to the Welfare and Institutions Code.

366.26 orders and remand for a new disposition hearing to determine whether father is entitled to reunification services.

BACKGROUND

Father has three children who are the subjects of this appeal: Daniel, Catherine, and Q.[2] Father's former wife Jeannie is the mother of Daniel. Father's former wife Stephanie is the mother of Catherine and Q.[3] Stephanie has a sister, Chelsea. Beyond these facts, the relationships between these individuals are somewhat complicated.

When Jeannie and father first met, he was dating Stephanie's mother, Cindy, and Stephanie's sister, Chelsea, had just been born. Jeannie and father were married for 14 years. Approximately six months after their son, Daniel, was born, she and father discovered that Cindy was intending to relinquish custody of Stephanie and Chelsea. Father retrieved them and brought them home to live with him and Jeannie.

Shortly thereafter, Jeannie discovered father was sexually abusing Stephanie, who was then 13 years old. He later also began sexually abusing Chelsea. When Stephanie was 15 or 16 years old, she gave birth to Catherine. Father and Stephanie married when she turned 18 years old and she gave birth to Q. shortly thereafter. Stephanie left father approximately four years later and they are now divorced. The court awarded father physical custody of Catherine and Q.

In December 2011, Trinity County Health and Human Services (the agency) detained Daniel, Catherine, and Q. and filed section 300 petitions on their behalf. The petitions alleged father had failed to provide adequate support. Based on father's history of sexually abusing Stephanie and Chelsea, the petition filed on behalf of Catherine also included the following allegation under section 300, subdivision (j) (the child's sibling

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[2] Please see the attached chart for assistance in understanding the relationships.

[3] Neither Jeannie nor Stephanie is a party to this appeal.

has been abused and there is a substantial risk that the child will be abused): "j-1 From in or about 12/01/1999, and continuing for at least three years thereafter, the father sexually abused his step-daughter, Stephanie . . . , as defined in subdivision (d). Stephanie . . . was age 14, or younger, when the abuse first occurred, and was severe sexual abuse, including sexual intercourse over a period of several years. Stephanie is the sister of the child, Catherine . . . , who is now age 11, and there is substantial risk that the child will be sexually abused in the same manner as Stephanie."

The jurisdiction hearing took place on February 6, 2012. Evidence was submitted, including statements from Stephanie, Chelsea, and Jeannie. The juvenile court sustained the petitions, including the following amended "j-1" allegation as to Catherine: "From in or about 1998 to in or about 2006, the father sexually abused his step-daughters, Stephanie and Chelsea . . . , as defined in subdivision (d) of Section 300. Stephanie . . . was age 14, or younger, when the abuse first occurred, and it was severe sexual abuse, including sexual intercourse over a period of several years. Chelsea was age 12, or younger, when the abuse first occurred. Stephanie and Chelsea are the sisters of the child, Catherine . . . who is now age 11, and there is a substantial risk that the child will be sexually abused in the same manner as Stephanie and Chelsea." The juvenile court did *not* sustain the "j-1" allegations contained in the amended petitions filed on behalf of Daniel and Q., which read: "From in or about 1998 to in or about 2006, the half siblings, Stephanie and Chelsea . . . were sexually abused by the father, . . . and there is a substantial risk that the child will be sexually abused or subjected to witnessing sexual abuse, which constitutes a substantial danger to the child's physical and emotional health."

At the March 19, 2012, disposition hearing, the minors were declared dependents and removed from parental care. The juvenile court denied father reunification services pursuant to section 361.5, subdivision (b)(6), based on the subdivision j-1 allegations in the petitions that child protective services asserted the court had found true. (As noted

above, the court actually found true only the subdivision j-1 allegation in the petition filed on behalf of Catherine.)

The section 366.26 hearing took place on June 11, 2012. Parental rights to Catherine and Q. were terminated. Long-term foster care or guardianship was selected as the permanent plan for Daniel.

DISCUSSION

Father contends the jurisdictional and disposition orders, and orders terminating parental rights to Catherine and Q., must be reversed because denial of reunification services was based on the improper jurisdictional finding that he had sexually abused the minors' half sibling(s).[4] He argues that this finding was erroneous because Stephanie and Chelsea, both of whom he sexually abused over the course of several years, were not Daniel, Catherine's, or Q.'s half siblings and thus the bypass provisions of section 361.5, subdivision (b)(6), do not apply. We agree.

Initially, we reject the agency's contention that father has forfeited his contention on appeal by failing to raise "the issue of the sibling relationship" in the juvenile court. Father partly brought the matter to the juvenile court's and the agency's attention at the detention hearing, when he stated, "There is a major error in the paperwork for the detention, paperwork for my daughter, Your Honor. It mentions Stephanie . . . as the sister of Catherine . . . , which Stephanie is the mother of Catherine, not her sister." When counsel for the agency and minor stated that Stephanie and Catherine were

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[4] Father is entitled to raise issues relating to jurisdiction and disposition in this appeal, in accordance with this court's previous order filed on June 26, 2012, in case No. C071366: "Petitioner . . . [father] will be relieved from the preclusive effects of Welfare and Institutions Code section 366.26, subdivision (l), which would otherwise prohibit petitioner [father] from raising issues on appeal that were not preserved by filing a petition for extraordinary writ pursuant to California Rules of Court, rules 8.450 and 8.452, due to the trial court's failure to timely send a copy of the notice of intent as required by California Rules of Court, rule 8.450(f)."

stepsisters because father was Stephanie's stepfather, father replied, "I was her guardian. I wasn't her step-father." And while father did not at that time deny that Chelsea was the half sibling of the minors -- a point emphasized by the agency -- the allegations at that time did not yet include or mention Chelsea, so there was no reason for him to do so. Thus, father cannot be considered to have forfeited his contention. In any event, and more importantly, father's failure to further pursue the matter of the relationship between Stephanie and Chelsea and the minors does not forfeit the legal issue of whether there is substantial evidence to support the juvenile court's jurisdictional finding. (*In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1560-1561; *In re Brian P.* (2002) 99 Cal.App.4th 616, 623 [contention that judgment not supported by substantial evidence an obvious exception to forfeiture rule].)

The juvenile court has jurisdiction to declare a child to be a dependent of the court pursuant to subdivision (j) of section 300 when (1) the "child's sibling has been abused or neglected, as defined in subdivision . . . (b) . . . and [(2)] there is a substantial risk that the child will be abused or neglected, as defined in [that] subdivision[]."

The juvenile court sustained the allegation set forth in the petition filed on behalf of Catherine under "j-1" that father had sexually abused Stephanie and Chelsea and that they were Catherine's sisters. The evidence, however, does not support this finding. While there is some evidence that father was Stephanie and Chelsea's *guardian*, there is no evidence that father was Stephanie's biological or adoptive *father*. There is also no evidence in the record suggesting father was ever married to Cindy, thereby making Stephanie and Chelsea his stepdaughters. And the only evidence that father is Chelsea's biological father is a statement made by father's former wife, Jeannie, that "there was a chance Chelsea could have been his kid." That statement simply does not rise to the level

of substantial evidence to support a finding that father is Chelsea's biological father.[5] Accordingly, there is insufficient evidence to support the subdivision j-1 allegation that father sexually abused Catherine's siblings or half siblings.

This unsupported finding was also the basis for denying father reunification services. Subdivision (b)(6) of section 361.5 states in part that reunification services need not be provided to a parent when the juvenile court finds, by clear and convincing evidence, "[t]hat the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of severe sexual abuse or the infliction of severe physical harm to the child, a sibling, or a half sibling by a parent or guardian, as defined in this subdivision, and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent or guardian."

The juvenile court found this provision applicable based on its section 300, subdivision (j), allegation jurisdictional findings. However, because the court never made such a jurisdictional finding as to either Daniel or Q., and because the jurisdictional finding as to Catherine was unsupported by any substantial evidence, the juvenile court erred in applying this section and denying father reunification services.

The parties recognize that there is some evidence in the record of at least one other statutory basis for denial of services. Specifically, there was evidence that father impregnated Stephanie with Catherine when Stephanie was a minor and she gave birth when she was 15 or 16 years old. We also note that there is some evidence (via father's

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[5] The agency's contention that Chelsea's use of the term "her father" to reference father somehow establishes father's paternity is baseless. Not only did Chelsea also repeatedly refer to father as "Chris," but she also explained at the outset that father had insisted she and Stephanie "call him dad" when he became their guardian.

former wife, Jeannie) that Stephanie was already pregnant with Q. by father when she turned 18.[6]

Section 361.5, subdivision (b)(8), provides that reunification services need not be provided to a parent or guardian when the court finds, by clear and convincing evidence that the child was conceived by means of the commission of an offense listed in Penal Code section 288 or 288.5 (or by an act committed outside of this state that, if committed in this state, would constitute one of those offenses). Because the juvenile court did not make any finding under subdivision (b)(8) -- let alone a finding by clear and convincing evidence -- it would be inappropriate for us to uphold the denial of reunification services as to Catherine on this basis. On remand, the juvenile court must conduct a new disposition hearing to consider whether father is entitled to reunification services, and at that time the court may consider whether this provision is applicable.[7]

DISPOSITION

The jurisdictional order is modified to strike the section 300, subdivision j-1 finding as to Catherine. The judgment of disposition and the orders made at the section 366.26 hearing are reversed. The matter is remanded for the juvenile court to hold a new disposition hearing to determine whether father is entitled to reunification services. If the juvenile court determines he is not entitled to reunification services, then the orders made

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[6] This information appears inconsistent with the dates listed on Quenten's birth certificate.

[7] We offer no opinion on whether conception must occur while the victim is under the age of 14 in the case of continuous sexual abuse (Pen. Code, § 288.5) in order for the bypass provision of section 361.5, subdivision (b)(8) to apply.

at the section 366.26 hearing shall be reinstated. If the juvenile court finds father is entitled to services, then it shall order reasonable services and continue the dependency.

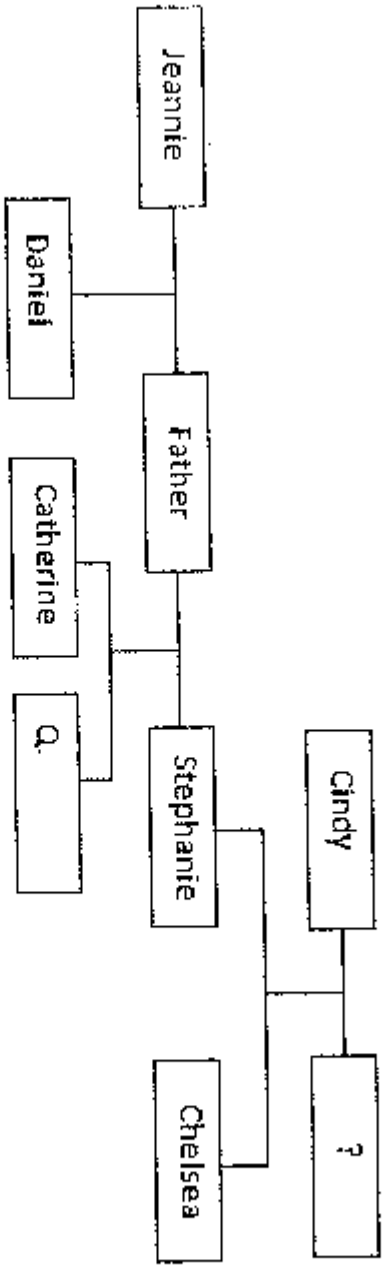
ROBIE, J.

We concur:

HULL, Acting P. J.

HOCH, J.

APPENDIX


Jeannie
Daniel
Father
Catherine
Q.
Stephanie
Cindy
Chelsea
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